No. 86-823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MOBIL OIL CORPORATION,
Petitioner,

v.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S REPLY BRIEF

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A somewhat unruly Armada has again put to sea under the flag of Florida. But, for most of this most recent journey, these great men-of-war (joined by lesser vessels from the State's Coastal allies) sail clean past our modest fleet without actual engagement or even an exchange of words, rough or smooth. Instead, the Floridian galleons fire loud broadsides at wholly imaginary ships ploughing a conveniently foolhardy course, and, perhaps deceived by the noise and smoke of their own guns, promptly claim victory. Our prime task, accordingly, is to set aside the elaborate fiction and very briefly to re-

state *our* arguments, as distinguished from those invented for us.

1. THE PRESENCE OF FEDERAL QUESTIONS

Respondent denies that this Court has jurisdiction to entertain the case, insisting that it presents no federal question (Opp. 3, 23). Much reliance is placed on the decision of the Eleventh Circuit in a related case referred to as *Mobil I*, now reproduced in full (Opp. App. C. 3a-33a). See Opp. 5 n.2, 12 and n.8, 23-24, 30 n.20, 28-29 and n.18, 31. But, of course, the holding there was that the federal *district court* had no jurisdiction to hear the case as one "arising under" federal law.[1] As we have previously noted (Pet. 15 n.11), that does not resolve the question whether this Court may hear the case under 28 U.S.C. 1257(3) because a federal "title, right, privilege or immunity" was "specially set up or claimed" in response to the defendant's plea or the state court's ruling. What is more, the jurisdiction of every federal court depends in large measure on the pleadings and arguments of the parties and the fact is that the federal questions presented here were not at issue in *Mobil I*.

We have already fully stated the extent to which the federal issues were raised below (Pet. 15-17) and need not recapitulate. We confine ourselves to three points Respondent has sought to muddle. First, petitioner did not stress the constitutional "taking" argument in the Florida Supreme Court and did not urge that court to reach it because we reasonably supposed the court would

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[1] Similarly, *Heirs of Burat v. Board of Levee Com'rs of Orleans, etc.*, 496 F.2d 1336 (5th Cir. 1974), and *Mays v. Kirk*, 414 F.2d 131 (5th Cir. 1969), cited by Respondent, decide only the absence of federal district court jurisdiction under 28 U.S.C. 1331. The further holding in *Mays* that the federal question alleged must be substantial obviously has no relevance when the party relying on federal law has been denied his federal claim by a determination that is plainly wrong under controlling decisions of this Court.

follow its own precedents and affirm the lower courts on state law grounds. Second, given that the holding of the court below was *not* expectable, it was sufficient to interpose the federal constitutional objection on motion for rehearing and that court's failure expressly to deal with the question cannot affect this Court's power to consider it. See Pet. 15-16. And, finally, once its jurisdiction attaches, this Court is *not* precluded from noticing a federal question that is presented by the record even if it has not been adequately preserved by the petitioner. See Pet. 16-17.

2. RIPENESS AND FINALITY

We are heartened to note that, while disputing its substance, Respondent apparently concedes the ripeness of the statutory question under the Swamp Lands Act. But the submission is that it would be premature to now consider the constitutional "taking" issue. Again, we have anticipated the objection and need not repeat ourselves. See Pet. 17-18. Two supplementary comments will suffice.

Contrary to Respondent's suggestion, it is self-evident that the decision of the Florida Supreme Court has already deprived petitioner of security of title, a thing of substantial value. One hardly needs judicial precedent for the proposition that a title to real property which, under existing law, was unimpeachable is greatly depreciated by a change of law that exposes it to challenge in expensive and protracted litigation, the outcome of which must always be uncertain considering the distant historical evidence that governs the result. Nor is it difficult to appreciate that thus converting a merchantable title into a mere precarious claim amounts to a taking of property in the constitutional sense. The costs and delays incurred in obtaining governmental permission to develop land may be part of the burden of doing business in modern society (*e.g.*, *Williamson Planning Comm'n v. Hamilton Bank*, No. 84-4 (June 28, 1985),

slip op. 3-4 (Stevens, J., concurring); but few would suggest the same approach when a new rule requires the owner to undergo onerous litigation and prolonged uncertainty merely to preserve his fee title.

The other point we would stress is that, in terms of ripeness, this case presents no problems comparable to those that concerned the Court in *Williamson County* or *MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986). Here, there is no outstanding question how far the challenged rule will bite—whether it will merely limit a planned development or deny all economic use of the property—that remains to be determined in further proceedings. In our case, if petitioner loses at trial, the extent of the loss is not uncertain: it will be wholly deprived of the affected land. So, also, there is for petitioner no possibility of compensation under State law for the "taking" of its property. The decision of the Florida Supreme Court leaves no such opening and there is no "court of claims" in Florida to which petitioner can apply.

3. THE STATUTORY ISSUE

We have submitted that the final determination, shared by federal and State authorities and solemnized in a federal patent, that specific lands qualify as "swamp or overflowed" within the meaning of the 1850 Act of Congress—and therefore were not "equal footing" or "sovereignty" lands—is unimpeachable at this late date, even by the State. Of course, this proposition, standing alone, does not establish petitioner's title to the lands in suit: petitioner claims solely under State deeds that encompass the disputed parcels. What we do say—and it is all we say—is that Florida cannot impugn the force of its own deeds by challenging the validity of the underlying federal patents issued under the Swamp Lands Act. To be sure, the federal question arises only because State law, at least until recent times, differentiated between "equal footing" (or "sovereignty") lands and Swamp Act lands,

permitting the Board of Trustees to alienate only the latter, and because, in this case, the Trustees have chosen to defend on the ground that the disputed lands were not correctly classified as "swamp or overflowed" in the 1850's. In effect, it is *the State* that has introduced the Swamp Lands Act as an issue and made it the dispositive point in the case.[2] But that cannot deprive petitioner of its right to invoke the statute and to seek its vindication in this Court.

On the merits, there is nothing remarkable about the rule that the ultimate determination of the federal Land Department as to the classification of land is conclusive, at least as to the actual or putative participants in the proceedings who did not then contest the administrative decision. The most recent illustration is the *Summa Corporation* case, so holding with respect to determinations under an 1851 Act passed by the same Congress as our 1850 statute. Indeed, the Trustees apparently now accept the proposition, acknowledging that "federal patents issued pursuant to [the Swamp Lands] Act [are] 'conclusive against any collateral attack'" (Opp. 25), and endorsing the ruling in *Mays v. Kirk*, *supra*, which treated the point as black-letter law. *See* 414 F.2d at 134-136.[3]

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[2] Thus, there would be no Swamp Lands Act question if, before the deeds relied upon here, Florida law had not authorized its Board of Trustees to sell lands acquired by the State under that statute.

[3] There is no basis for the suggestion (Opp. 31) that the Trustees' present challenge to the classification of the lands under the Swamp Act is not "collateral" because no "third parties" are involved. On the contrary, as *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921), sufficiently illustrates, a bar on "collateral attack" applies equally to the original participants in the statutory proceedings. And it is frivolous to argue that the patents are not being impeached here because petitioner, as movant on a motion for summary judgment, must assume the navigability of the Peace River in 1845. The whole point of conclusiveness is to foreclose reexamination of a determination that might turn out to be erroneous if litigated. *See, e.g., United States v. Coronado Beach Co., supra*, 255 U.S. at 487-488.

As we have already noted (Pet. 20), *Summa* has made clear that there is no basis for exempting State "sovereignty" interests. Respondent's reliance on *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.* 429 U.S. 363 (1977), is wide of the mark. The question here is not what law governs subsequent dispositions of the land or later physical changes, but whether the property was transferred from the United States by a patent issued under the Swamp Lands Act of 1850 or, rather, by virtue of the Equal Footing Doctrine at statehood. That, as *Corvallis* recognizes, *is* a matter controlled by federal law. And if, as *Summa* holds with respect to the comparable 1851 Act, the governing federal statute gives conclusive force to a determination made thereunder—even though erroneous—that federal rule is binding on the State.

We stress, finally, that Respondent cannot avoid this result by asserting that the United States lacked power to convey the riverbed under the Swamp Lands Act because those submerged lands had already passed to Florida upon its admission to the Union in 1845—if the relevant stretch of the Peace River was then navigable, as claimed. That argument was rejected under the 1851 Act in *United States v. Coronado Beach Co., supra*, 255 U.S. at 487-488, as this Court noted in *Summa*, 466 U.S. at 209. And, indeed, *Summa* itself stands for the same proposition.[4] A like rule, we submit, applies to determina-

[4] Respondent notes language in *Summa* alluding to the power of the United States, before statehood, to alienate the beds of navigable waterbodies when necessary "to discharge its international duty" under the Treaty with Mexico. *See* 466 U.S. at 205-206 and n.4. But the fact is that the Court in *Summa* left unresolved the question whether the public trust easement claimed by California had been reserved by Mexico when it granted the land to petitioner's predecessors. *Id.* at 201 n.1. If so, the United States had no treaty obligation to confirm that interest in the Mexican grantees. Under Respondent's argument, the easement would instead have inured to the State upon its admission to the Union and the later federal patent could not transfer the interest elsewhere. Yet, the Court gave conclusive effect to the patent, even if over-generous, on the ground that the State failed to interpose a timely objection.

tions under the 1850 Swamp Lands Act, the State being bound by its contemporaneous acquiescence in the land classification. *Cf. McCormick v. Hayes*, 159 U.S. 332, 347-48 (1895); *Rogers Locomotive Mach. Works v. American Emigrant Co.*, 164 U.S. 559, 575-577 (1896).

4. THE CONSTITUTIONAL ISSUE

If we correctly understand Respondent's answer to our constitutional argument, it is perverse indeed. The trick is to say that nothing can have been "taken" if, at trial on remand, it is determined that petitioner never had a title to the land in issue. Opp. 35-36, 38-39. But see Opp. 39 n.27. That is, of course, precisely the kind of manipulation that we complain of: a belated, retroactive declaration that private rights solemnized by formal deeds from the State, enjoyed with official acquiescence for a century, and expressly acknowledged in litigation as recently as 1965,[5] never really existed at all. Our submission is simply that such confiscation of vested title to land no less offends the federal Constitution when accomplished by judicial re-definition of the law than if attempted by executive or legislative action.

The only inquiry is whether the Florida Supreme Court has in fact changed the rules so as to permit such an expropriation. That, however, is a matter for this Court, not a state trial court. We do not pursue the debate at this time, except to note that, like the Florida Supreme Court itself, Respondent wholly ignores four of the most relevant precedents (see Pet. 11, 32), downgrading the fifth (*Odom v. Deltona Corp.*) to a footnote which merely quotes the court below (Opp. 52 n.38),[6] and nowhere

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[5] *See Burns v. Coastal Petroleum Co.*, 194 So. 2d 71, 74 (Fla. 1st DCA 1966), *cert. denied*, 201 So.2d 549 (Fla.), *cert. denied*, 389 U.S. 913 (1967). *See also* Pet. 7, 9. Unsurprisingly, Respondent ignores this decision.

[6] For a full statement of the relevance of the *Deltona Corp.* decision, see Brief of Amicus Curiae, Florida Land Title Association, Inc., at 15-17.

rebuts our explanation of the four older cases invoked below as stating an *exception*, not the general rule (see Pet. 22-23). This failure to face up to the difficulties strongly suggests that the decision below is as unprecedented and unprincipled as we have charged.

CONCLUSION

For the reasons stated here and in the petition, a writ of certiorari should be issued to review the decision of the Florida Supreme Court.

Respectfully submitted.

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